

**BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D. C. 20554**

IN THE MATTER OF:

**Rules and Regulations Implementing the Telephone
Consumer Protection Act of 1991**

CG Docket No. 02-278

Petition for Declaratory Ruling of the Fax Ban Coalition

**COMMENTS OF THE TENNESSEE REGULATORY AUTHORITY
OPPOSING THE FAX BAN COALITION'S REQUEST
FOR FEDERAL PREEMPTION OF STATE LAW AS
APPLIED TO INTERSTATE FACSIMILE ADVERTISING**

The Tennessee Regulatory Authority (the "TRA") of the State of Tennessee submits these Comments in response to the petition filed by The Fax Ban Coalition (the "Petitioner" or the "Coalition") requesting declaratory rulings that the Federal Communications Commission (the "Commission" or "FCC") has exclusive authority to regulate interstate "commercial fax messages" and that all State laws purporting to regulate "interstate facsimile transmissions" are preempted by the Section 227 of the Federal Telephone Consumer Protection Act ("TCPA").¹

The Coalition's arguments and reasoning are flawed, because the FCC has no authority to preempt state laws regulating unsolicited facsimile advertisements and instead has jurisdiction over communications services. The state laws are consumer protection regulations that relate to communication services only to the extent the activities being regulated involve *use* of such services. The laws simply do not regulate the provision of telephone or facsimile service and therefore are not subject to federal preemption.

¹ *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CG Docket No. 02-278, *Petition for Declaratory Ruling*, p. 1 (November 7, 2005) ("*Coalition Petition*") (citing 47 U.S.C. § 227).

The Coalition cites the Supreme Court's decision in *Louisiana Public Service Commission*² in support of its argument that the Commission may preempt the state regulation of these junk faxes. The case, however, instead supports the determination that the FCC may *not* preempt these regulations. The Court in *Louisiana* did restate the general rule that "a federal agency acting within the scope of its congressionally delegated authority may pre-empt state regulation."³ The Court, however, then determined that the FCC did *not* have authority to preempt the state regulation at issue in the case before it. In so ruling, the Court found the "critical question in any preemption analysis is always whether Congress intended that federal regulation supersede state law."⁴

Congress did not intend to supersede state regulation of unsolicited facsimile communications.⁵ The TCPA contains no clear statement of express intent to preempt state law governing the sending of unsolicited fax advertisements by individuals or entities doing business in the state. Indeed, consumer protection and privacy issues, which are implicated by do not fax regulations, have long been part of the states' police powers. The Coalition specifically argues that Congress, in enacting the Junk Fax Prevention Act of 1995, "underscore[d] its intentions with regard to uniform regulation of commercial fax transmissions."⁶ The Senate Report for the act, however, reveals a different intention. It specifies that the Junk Fax Prevention Act will "not affect the ability of states to establish stricter rules for the use of telephone facsimile machines or other electronic devices to send unsolicited advertisements."⁷

The Tennessee Regulatory Authority promotes and encourages a safe, healthy business environment that advances a culture that is good for the welfare and safety of all citizens, industry and government. The Tennessee General Assembly created the Tennessee Do Not Fax

² *Louisiana Pub. Serv. Comm'n v. FCC*, 476 U.S. 355 (1986).

³ *Id.* at 369 (emphasis added).

⁴ *Id.*

⁵ For a general discussion of states' authority to regulate unwanted calls and faxes, without federal preemption, see *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CG Docket No. 02-278, *Comments of the Tennessee Regulatory Authority Opposing Telemarketers' Requests for Federal Preemption of State Telemarketing Law as Applied to Interstate Calls* (July 29, 2005).

⁶ *Coalition Petition*, p. 4 (November 7, 2005).

⁷ S. Rep. No. 109-76 (2005).

law in 2003⁸ to regulate unsolicited facsimile advertisements, not “interstate fax communications” or “interstate commercial fax messages.” The law was created to address the growing problem of consumers receiving copious unsolicited faxes. The statute clearly defines unsolicited facsimile advertisement, the activity being regulated, as follows:

“Unsolicited facsimile advertisement” means any material advertising the commercial availability or quality of any property, goods, or services, that is transmitted by fax to any person located within the state of Tennessee without such person's prior express invitation or permission, and is transmitted from Tennessee or elsewhere for the purpose of offering the extension of credit or encouraging the purchase or rental of, or investment in, property, goods, or services.⁹

The Tennessee statute clearly specifies that a violation of the Do Not Fax law also constitutes a violation of the Tennessee Consumer Protection Act of 1977, compiled in title 47, chapter 18, part 1 of the Tennessee Annotated Code.¹⁰ The violations are

construed to constitute an unfair or deceptive act or practice affecting trade or commerce and subject to the penalties and remedies as provided in [the Tennessee Consumer Protection Act], in addition to the penalties and remedies set forth in [the Do Not Fax law] as well as that of 47 U.S.C. § 227, or any other cause of action, civil remedy or penalty provided by law.¹¹

The language of the statute clearly reveals the sole purpose of the Tennessee legislation is to create effective consumer protection regulations that prohibit the sending of unsolicited fax advertisements to fax machines located in Tennessee, which were being inundated by unsolicited facsimiles. Neither the purpose nor the substance of Tennessee state law as it pertains to unsolicited facsimile advertisements makes the law an issue the Commission should consider for preemption.

The Petitioner has argued that the senders of unsolicited fax advertisements suffer hardship by complying with the laws of the various states. We respectfully ask the Commission to closely analyze and examine the information and facts at hand. An irony of this issue is that at

⁸ Tenn. Code Ann. §§ 65-4-501 through -506 (2004).

⁹ Tenn. Code Ann. § 65-4-501(5) (2004).

¹⁰ Tenn. Code Ann. § 65-4-506(a) (2004).

¹¹ Tenn. Code Ann. § 65-4-506(b) (2004).

least one of the companies participating as a member of the Coalition has requested assistance from the TRA on behalf of its customers concerning harassing and abusive faxing practices. Apparently, this company recognizes the value of state regulation, despite its participation as a member of the Fax Ban Coalition.

On a daily basis, states play a vital role in addressing consumer complaints regarding unsolicited fax advertisements, freeing the federal court system of burdensome cases that would slow the operations of the justice system. The Petitioner should be grateful for the active enforcement role the states have taken to keep legitimate faxing as a viable means of conducting commerce with customers. States play an ever-important role in helping to police abuses in fax advertising. If consumers continue to be deluged by unsolicited fax advertisements, they may discontinue or severely limit use of fax machines, thus making faxing an obsolete or under-utilized technology. Moreover, states have pursued enforcement against many companies that use unsolicited fax advertisement to promote fraudulent schemes. For example, the TRA has investigated cases involving “pump and dump” stock manipulation,¹² Nigerian 419 scams,¹³ and “discount” health care services¹⁴ and has assisted other state and federal agencies in pursuing

¹² “Pump and dump” stock manipulations involve the faxing of fraudulent information extolling a particular stock and urging consumers to invest. When effective, consumers buy large quantities of the stock, creating high demand and “pumping” the stock price. Those responsible for the fax advertisements then sell (or “dump”) their shares at the increased price and stop promoting and advertising the stock. The stock price then drops, and investors lose their money.

¹³ “Nigerian 419 scams” are named for the Nigerian penal code addressing fraud schemes. They take many forms but typically involve a perpetrator posing as an “official” of a foreign government or agency. The alleged official claims that the consumer is eligible to participate in a deal or receive large sums of money. The specific details vary, but the alleged source of funds often is related to “over-invoiced contracts” from earlier governmental regimes, disbursement of estate funds, real estate ventures, purchases of crude oil at reduced prices, paper currency conversion, or awards. The fraudulent advertiser eventually conveys an urgent need for the consumer to provide up-front funds for various taxes or fees. Many consumers have complied with such requests and been defrauded. The perpetrators sometimes resort to violence and threats or physical harm to further pressure victims into providing funds. In 1995, an American was murdered while pursuing a 4-1-9 scam, and numerous other foreign nationals have been reported missing. See United States Secret Service, *Public Awareness Advisory Regarding “4-1-9” or “Advance Fee Fraud” Schemes* (2002), available at: <http://www.secretservice.gov/alert419.shtml>.

¹⁴ “Discount” health care services scams involve the advertisement and marketing of health discount card plans which falsely purport to offer substantial discounts for health care services and products. Some indicate they are actually selling health insurance. When successful, the marketers obtain the consumer’s bank account or credit card information and charge the consumer for an enrollment fee before the consumer receives the welcome packet. Only in the welcome packet does the perpetrator fully reveal the terms, conditions and restrictions of the alleged plan, which make the plan useless or much less valuable than the marketer portrayed to the consumer in the advertisement.

associated enforcement actions, sometime on a national level.¹⁵ Tennessee's cooperation with federal agencies has proven the current dual system of fax regulation is effective and efficient.

The importance of state involvement with do not fax regulation is perhaps best illustrated by the recent case against Fax.com in California.¹⁶ Fax.com was engaged in activities that violated both the TCPA and California consumer protection regulations against unsolicited fax advertisements. The FCC had assessed a \$5 million fine against the company, but the company continued its activities. The state attorneys general of California and Indiana filed suit in federal court and were able to obtain an injunction against the company, enjoining and restraining Fax.com from continuing its faxing practices. The states thus were able to obtain some level of consumer protection, which had not been accomplished by the FCC's fine assessment.

Historically, states have been on the front lines and the first to contend with problems that require change to address the needs of their citizens. A prime example of this is the evolution of states' involvement with the establishment of Do Not Call regulations to prohibit telemarketing abuses. The state activities served to catalyze the formation of the National Do Not Call program under the direction of the Federal Trade Commission and the Federal Communications Commission. From the levels of participation, do not call programs have to be considered as one of the most successful consumer protection initiatives over the past fifty years. The shared enforcement of this consumer protection initiative by states acting along with the federal government has created a win-win situation for state and federal governments, resulting in improved enforcement of all relevant regulations. The TRA urges the FCC to consider retaining a similar approach to the Do Not Fax regulation and enforcement.

Respectfully, the Commission is not the proper entity to address the petition. The question of *whether* a statute is preemptive is a matter "more within the expertise of the courts

¹⁵ See, e.g., U.S. Securities and Exchange Commission, Litigation Release No. 19040 (January 21, 2005), *available at*: <http://www.sec.gov/litigation/litreleases/lr19040.htm>; Litigation Release No. 19085 (February 16, 2005), *available at*: <http://www.sec.gov/litigation/litreleases/lr19085.htm>.

¹⁶ *California v. Fax.com, Inc.*, Case No.: 03 CV1438 DMS, *Preliminary Injunction* (S.D. Cal. 2004), *available at* http://www.junkfax.org/fax/broadcasters/fdc/fdc_CaAGinjunction10-5-04.pdf.

than within the expertise of [an administrative agency].”¹⁷ The Commission also lacks authority to make the preemption determination Petitioner seeks and should deny the Petition on that basis.

For these reasons, the TRA respectfully requests that the Commission decline to consider the petition because it is beyond the scope of the Commission’s authority. Should the Commission choose to consider the Petition, the TRA urges the Commission to deny the Fax Ban Coalition’s request for a categorical preemption of all state laws governing unsolicited fax advertisements and deny the Coalition’s request for declaratory rulings.

Dated: January 13, 2006

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Ron Jones", is written over a horizontal line.

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¹⁷ *Colorado Pub. Utils. Comm’n v. Harmon*, 951 F.2d 1571, 1579 (10th Cir. 1991). See also *Smiley v. Citibank (South Dakota)*, 517 U.S. 735, 744 (“We may assume (without deciding) that [the question of whether a statute is pre-emptive] must always be decided *de novo* by the courts.”).